with the illegality of maintenance. But the court gave judgment for the plaintiff, holding that the doctrine of maintenance did not apply to criminal proceedings. "Maintenance consists in interfering with matters in which the person has no concern. It is for the public benefit that any one should be entitled to prosecute."

In both cases the general propositions as to the law of maintenance are undoubtedly correct. In the second case, however, it is worth while noticing that the defendant was not sued in tort for maintenance, but was sued in contract. While the contract was clearly not tainted with maintenance, it does not follow that it was quite unobjectionable on some other ground of public policy. It is one thing to say every man is entitled to prosecute a criminal action, and another to assist him in making a profit by so doing. It is not the policy of the law to stimulate an improper prosecution, nor to assist those who inaugurate such proceedings. The injured party has, to be sure, his action for malicious prosecution. That is probably one reason why the tort of maintenance has never been applied to criminal actions. But the wrong-doer should not be aided by the court to profit by his tort. If it could be shown that the plaintiff in the principal case knowingly undertook a malicious prosecution, that would seem to be a good defence to the action on the contract. The point was not brought out by the pleadings or argued on the appeal, and perhaps was not justified by the facts.

OFFER AND ACCEPTANCE. — The New York Court of Appeals last December divided almost evenly on a question of some interest to the business community. Two parties had been exchanging letters with a view to an agreement, and finally one made an offer, definite in all its terms, and added, "If satisfactory, answer, and I will forward contract." The reply was, "All right; send contract." When the contract was sent, the other party refused to sign it. A bare majority of the court held that there was a contract. *Sanders* v. *Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209.

It seems to be well settled, as the cases collected in 40 Cent. L. J. 92 show, that the mere fact that parties wish to have a formal agreement drawn up will not prevent their being bound by a previous agreement, if it is clear that such an agreement has been made. *Bonnewell* v. *Jenkins*, 8 Ch. D. 70; *Bell* v. *Offutt*, 10 Bush, (Ky.) 632; *Blaney* v. *Hoke*, 14 Oh. St. 292; *Mackey* v. *Mackey*, 29 Gratt. 158; *Cheney* v. *Eastern Trans. Line*, 59 Md. 557; *Paige* v. *Fullerton*, 27 Vt. 485; *Chinnock* v. *Marchioness of Ely*, 1 De G. J. & S. 638; *Winn* v. *Bull*, Ch. D. 29, 32. On the other hand, if the acceptance is made subject to a written agreement, or if the terms of the bargain are not definitely settled, there is no contract, and in all cases the fact that a subsequent agreement is to be drawn up is cogent, although not conclusive, evidence that the parties do not intend to be bound. *Ridgway* v. *Wharton*, 6 H. L. C. 238; *Winn* v. *Bull*, 7 Ch. D. 29. But when there is a definite proposal, definitely assented to, and when the acceptance is not expressly made subject to a future agreement, it seems more reasonable to suppose that the parties intend the very terms agreed upon to be put into form, than that they intend them to be subject to a future agreement, the terms of which are not expressed in detail. There is in such a case little more than the mere fact that a future agreement is to be drawn up, and that, as already stated, is not enough. A definite offer, accepted in terms, is in most

cases enough to make a contract, and, according to the opinion of the majority, it makes one in this case. The contract is to sell goods and to sign a written paper as evidence, and because one of the parties refuses to sign the paper, *non sequitur* that the other may not prove the contract by other legal evidence.

The New York Court divided in the same way on the same question in 1860. *Pratt* v. *The Hudson River R. R.*, 21 N. Y. 305.

COURT AND JURY. — During the trial of the case of *Cahill* v. *Chicago, Milwaukee & St. Paul Railway Co.*, in the Circuit Court of the United States at Chicago (Chicago Law Journal, January, 1895, p. 4), the judge directed the jury to find a verdict for the defendant. This one of the jurymen refused to do, and he was, as a consequence, ordered into the custody of the marshal. Before the question of contempt, however, came on for hearing, the verdict was accepted by the plaintiff's attorney subject to exceptions. The point raised during the trial was, nevertheless, of such novelty and importance that it received no little discussion in the current papers. The reason why such questions seldom arise is, probably, because judges ordinarily try to avoid coming into conflict with the jury, and generally, in some tactful manner or other, avoid the dispute. Indeed, such finesse is almost always necessary in handling a somewhat unmanageable body like our jury, which is much easier led than driven. In a very similar case in Vermont, for example, the judge told the jury he would not insist if they thought his action wrong, but that they had better consider the situation carefully before coming to any conclusion. They followed his advice, deliberated, and finally went his way. Here, however, no such conciliatory measures were adopted, and the result was a temporary conflict, in which the rights of the jury were substantially involved. It would seem as if *Bushell's Case* (Vaughan, 135, 142, 147–149), decided in 1670, had settled the law on this subject once for all. Indeed, although that decision might well have been regarded as somewhat weakened because it went on a conception of the jury which no longer prevails (Thayer's Cas. on Evidence, 5–19), it has nevertheless been considered undoubted law up to the present time; and wisely so, it would appear. It is only right that the functions of the court, as trier of law, and the jury, as trier of fact, should be carefully distinguished (Thayer's Cas. on Evidence, 143–238), and although the juryman would be undoubtedly justified, legally and morally, in returning a finding of facts which he does not believe in, if so ordered to do, yet it is hard to see what right the judge has to coerce the jury to arrive at his result. An honest man, laboring under a misunderstanding as to the weight and meaning of the words "law and fact" in his oath, might well refuse to tell what he regarded as a gross lie. The advantage of punishing him for so doing is by no means apparent, as such a method is, it would seem, against the usually accepted doctrine, and is at best a useless exercise of authority, when the same result might be as easily accomplished in a more peaceful way.

MALICE. — A point of considerable interest, though not entirely new, has just been decided by Kekewich, J., in the recent English case of *Trollope & Sons et al.* v. *London Building Trades Federation* (11 *The*